IN THE

Supreme Court of the United States

October Term, 1977
No. 77-463

A. ROWLAND BOUCHER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner A. Rowland Boucher prays that a writ of certiorari issue to review a decision of the United States Court of Appeals for the Second Circuit, dated July 22, 1977, which affirmed a

judgment of conviction for securities fraud (15 U.S.C. § 78(j)(b)), mail fraud (18 U.S.C. § 371), entered in the United States District Court for the Southern District of New York after a trial by jury. John King, a defendant below, also has filed a petition with this Court.

OPINIONS BELOW

The opinion of the Court of Appeals is included in Appendix A, pp. 1a-25a. The opinion of the District Court is included in Appendix B, pp. 26a-44a.

JURISDICTION

The judgment of the Court of Appeals was entered July 22, 1977. A

petition for rehearing was denied on August 24, 1977, and that decision is included in Appendix C, pp. 45a-46a. The time for filing this petition extends to and including September 24, 1977. The jurisdiction of this Court is conferred by 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was automatically immunized under § 7(a)(10) of the Bankruptcy Act (11 U.S.C. § 25(a)(10)) as a result of testimony given by the petitioner in hearings held pursuant to § 167 of the Bankruptcy Act.

2. Whether the Government's use of such testimony, if immunized, subsequent to the indictment to gain an advance preview of what position petitioner

would take at time of trial and assistance in preparation for petitioner's cross-examination requires dismissal of the indictment.

3. Petitioner further urges those issues raised by petitioner King, because they equally affect petitioner's right to a fair trial, viz. a preclusion by the Court limiting the proof as to the present value of the property claimed to have been fraudulently inflated by the conduct of the defendants.

STATUTES INVOLVED

The statutory provisions involved are § 7(a)(10) and § 167 of the Bankruptcy Act (11 U.S.C. § 25(a)(10) and § 567).

STATEMENT

Petitioner A. Rowland Boucher was president of King Resources Company ("KRC"), which, in 1969 and to this date, jointly held vast tracts of oil and natural gas resources in the Canadian Arctic along with Fund of Funds ("FOF"), an off-shore open-end investment company. In December, 1969, KRC's principal customer FOF requested an evaluation of a part of their joint holdings in the Arctic. To accomplish this evaluation, it was agreed that a small portion of these jointly held Arctic leases would be the subject of arms-length sales. In December, 1969, KRC effected two sales negotiated by John King, KRC's then Chairman of the Board, its principal stockholder and petitioner's codefendant who secretly

guaranteed, according to the Government's proof, the buyers against any loss on their purchase. Thereafter, the petitioner, then President of KRC, and his codefendant King, in confirmation letters to FOF's auditors, falsely represented that these sales were "arms-length" transactions.

The Government's proof at trial included evidence on the negotiation and consummation of these sales, the value of the Arctic leases which were the subject of the sales, and on other natural resource properties sold to FOF by KRC.

The gravamen of the Government's case against petitioner was that he had fraudulently misrepresented, in the above-referred to confirmation letters to the FOF auditors, that these sales of natural resource properties were arms-length

transactions when in fact they were not. His defense was predicated on his denial of guilty knowledge of any buy-back guarantees with respect to the aforementioned sales as well as his good faith belief at the time that the natural resource properties were worth as much if not more than what the "arms-length" purchasers paid for them.

On August 14, 1971, creditors of KRC filed an involuntary petition in bankruptcy against KRC in Dallas, Texas.* Thereafter, the Bankruptcy Court appointed a trustee, and the petitioner as an

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* Those proceedings continue to this day, with the SEC reversing itself and now recognizing the marked increase in value in KRC's Arctic leases during the years. The Court at time of trial refused petitioner's opportunity to prove that the present value of these Arctic leases are twenty or more times the value placed on them in 1969 by the petitioner.

additional trustee. Both trustees were to perform the "statutory duties" imposed upon the bankrupt under the Bankruptcy Act. At the commencement of these proceedings, petitioner, through counsel, reserved all of his rights to any statutory immunity. Appendix D, pp. 47a-54a. Petitioner then testified for approximately six hours.

On October 20, 1971, the bankruptcy proceeding involving KRC was transferred from Dallas, Texas to a more appropriate venue, Denver, Colorado. A new trustee was appointed and petitioner resigned as trustee, although he remained as KRC's Chairman of the Board and Chief Executive Officer. On August 6 and 7, 1973, the trustee's counsel examined petitioner Boucher on virtually every material

subject that was to be the subject matter of the indictment as well as on the factual material that would arise on trial of this case.

During the period of the Chapter X Reorganization Proceedings involving KRC, it was undisputed that petitioner hired and fired personnel; conducted various drilling programs of KRC's natural resources enterprises; performed functions with respect to KRC's satisfying its obligations to its creditors; negotiated, prepared, reviewed, and implemented various natural resource contracts entered into during the course of the bankruptcy proceedings; and submitted affidavits to the federal court administering the bankruptcy in connection with the purchase and/or sale of KRC's properties.

On the eve of trial, after substitution of counsel,* the petitioner moved to dismiss the indictment on the ground that he had been previously immunized in connection with the bankruptcy proceedings of KRC.

In its response, the prosecution conceded that the following documents had just been discovered in its files:

1. The transcript of Boucher's deposition conducted by the Denver trustee on August 6 and 7, 1973, which was located in a file denominated "Irrelevant";

2. Excerpted portions of the transcript of Boucher's testimony conducted on September 13, 1971, in Dallas, in which, early on in the transcript, he refused to

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* The District Court had noted that petitioner had for some time been acting pro se.

waive any immunity privileges under the Act;* and

3. A copy of the Denver trustee's report, dated October 10, 1973, which, the Government conceded, was based in part on Boucher's testimony.

In addition, the staff attorney of the SEC who was responsible for the KRC investigation (and who assisted the prosecution to the extent of sitting at counsel table during the trial) admitted reading the August 6 and 7, 1973 testimony in the summer of 1975 (prior to the trial),

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* It is unknown whether this was the cause of the 1973 deposition's finding its way into an "irrelevant" file in the U.S. Attorney's office. In any event, the Government was clearly in violation of its departmental directives in the treatment of bankruptcy testimony, see Dept. of Justice Memo No. 744, April 8, 1971, to "All U.S. Attorneys" outlining precautionary measures in dealing with bankruptcy immunity. Appendix E, pp. 55a-59a.

but claimed he did not recall any of it and dismissed it as irrelevant.

Further, the prosecutors explained in their affidavits that they believed they had not read the transcripts because they had repeatedly discussed among themselves and their SEC colleague what position the petitioner and his co-defendant might take at the time of trial, and, thus, would have remembered reading the August 1973 transcripts.

The Court denied the motion without a hearing but granted leave to renew it following the trial.

POST-TRIAL

Following the verdict, a hearing was held and the Court denied the motion, inter alia, on the ground that

the Government did not obtain any "leads" from Boucher's testimony in KRC's reorganization proceeding.

During the hearing, the SEC staff counsel testified that he had contacted the trustee's counsel shortly after being assigned to the investigation in September 1973, and that he had not focused on the two critical sales transactions until after he had had such contact with the trustee's counsel. He further acknowledged that he had had a number of conversations in the fall of 1973 with the trustee's counsel after the investigation had focused on the critical sale transactions and that he had also obtained, in the fall of 1973, a copy of the Trustee's Report, which questioned the bona fide nature of those two transactions. Moreover, the Government

did not dispute that the trustee had had to take into consideration petitioner's testimony in the preparation of the Trustee's Report and conceded, contrary to the pre-trial position, that the August 6 and 7, 1973 transcripts contained matters relevant to the indictment and trial of the case.

Last, the prosecutor in charge of the investigation and trial admitted that he had directed the SEC attorney to examine the Dallas deposition to find a so-called "lie" that petitioner was reported to have made in that proceeding. That testimony essentially dealt with petitioner's response to questions concerning the value of the natural resource properties, which were the subject matter of the two critical sale transactions and

which went to the very core of the indictment. The chief prosecutor also acknowledged to the Court that his motive in asking the SEC attorney to examine the Dallas transcript was to ascertain what type of witness the petitioner would make at time of trial.

REASONS FOR GRANTING THE WRIT

I. Petitioner's claim for immunity stems from his testimony in a Section 167 proceeding in the context of a Chapter X Reorganization of KRC, of which he was by that time the President and Chairman of the Board. The Court of Appeals did not address the issue of immunity in this context because it erroneously limited "use" and "derivative use" to the furnishing of investigatory leads by the immunized

testimony and not the obtaining of a tactical advantage by knowing in advance of trial the position of the defendant and its consequent assistance in cross-examination. However, the benefits of the immunity statute, Section 7(a)(10) of the Bankruptcy Act (11 U.S.C. 25(a)(1)), must apply to a witness in a hearing held pursuant to Section 167 as well as to other pertinent provisions of the Bankruptcy Act.

Section 7(a)(10) of the Bankruptcy Act (11 U.S.C. 25(a)(1)), as part of the Organized Crime Control Act of 1970, affords the bankrupt use and derivative use immunity. Section 207 of Pub. Law No. 91-452 Cong., 2d Sess. (1970). Section 21(a) of the Bankruptcy Act provides for an examination of the bankrupt,

his or her spouse, and other persons when designated by Order of the Court. In the case law which evolved in interpreting the immunity provisions of Section 7 of the Bankruptcy Act, the courts found that a Section 21(a) hearing incorporated the immunity provision of the Act when the witness was performing the duties of the bankrupt. United States v. Weissman, 219 F.2d 837, 841 [L. Hand dissent] (2d Cir. Cir. 1955); In re Bush Terminal Co., 102 F.2d 471-472 (2d Cir. 1939), 349 F.2d 264; 6 Collier on Bankruptcy (14th ed. 1972) ¶ 6.19, pp. 1224-25.

Similarly, the above-cited statutory provisions must be read in para materia with a Chapter X Reorganization under the Bankruptcy Act. Section 102 of Chapter X (11 U.S.C. § 502) makes ". . . the provisions

of Chapters 1 through 7 inclusive [Straight Bankruptcy] . . . apply in proceedings under this chapter [Corporate Reorganization] . . ." Section 167 of the Act (11 U.S.C. § 567) provides for an examination of the "debtor" and, thus, is the equivalent of a Section 21(a) examination in a "bankruptcy proceeding". In fact, Section 167 is broader in scope and purpose than the other provisions in that the need for complete financial disclosure is more extensive in the context of a reorganization proceeding involving a public company such as KRC.

Although there are no definitive cases granting immunity under Section 167, the rationale and benefits of immunity should clearly apply to a Section 167 examination. General Stores v. Shlensky, 350 U.S. 462, 467 (1956); In re Standard

Gas & Electric Co., 54 F.Supp. 752, 754 (D.C. Del. 1944), 2 Collier on Bankruptcy, ¶ 21.05, pp. 278-282 [p. 278, n. 1, 3]; 6 Collier on Bankruptcy, supra, ¶ 7.19, pp. 1215-1221.

During the times when petitioner testified, first in the Dallas and then in the Denver KRC bankruptcy proceedings, petitioner was initially a co-trustee and then, later, as President and Chairman of the Board, an active part of the management of KRC, the debtor company. Moreover, he was at all times relevant a principal corporate officer of the bankrupt corporation, had basic responsibility for performing the duties of the bankrupt, and, therefore, was immunized. United States v. Weissman, supra, 841; United States v. Castellana, 349 F.2d

264, 273-74 (2d Cir. 1965).

II. In affirming the judgment of conviction, the Court of Appeals erroneously limited use and derivative use to "investigatory leads" and did not consider the use made of immunized testimony by the prosecution which afforded it the opportunity to prepare for cross-examination of the defendant as well as for the preparation of the over-all case by knowing in advance the position that the defendant would take at time of trial on issues relevant to the indictment. The Court of Appeals for the Second Circuit, inter alia, held, at p. 4893 of its opinion:

> "Because the prosecution already had independent sources for its full case, Boucher is wrong in claiming taint merely because the SEC attorney, after the indictment, in order to see what

> kind of witness this appellant would make, read Boucher's 1971 bankruptcy testimony (see United States v. Bianco, 534 F.2d 501, 514 n. 14 (2d Cir.), cert. denied, 429 U.S. 822 (Oct. 5, 1976)). The same is true of the Government's mere possession somewhere in its files of Boucher's 1973 bankruptcy testimony.[9]"

Thus, in footnote 9 of its opinion, the Court found it did not need to consider whether immunity applied in the Section 167 hearing:

> "Because we find no taint with respect to any of the evidence used by the prosecution, we need not consider the point that Boucher's 1973 testimony under Section 167 of the Bankruptcy Act, 11 U.S.C. Section 567, did not grant him immunity."

However, the very case cited by the Court of Appeals at p. 4894 of its opinion in order to affirm petitioner's conviction, United States v. Bianco, supra, at p. 514, n. 14, in fact supports

petitioner's contention that an improper "use" by the Government would be the utilization of immunized testimony to obtain an advance view of what his position at trial would be and gaining that assistance in preparing for cross-examination, holding, at p. 514, n. 14:

> ". . . The McDaniel court concluded that the prosecutor's use of the testimony could include such things as 'assistance in focusing the investigation, deciding to initiate prosecution, refusing to plea-bargain, interpreting evidence, planning cross-examination, and otherwise generally planning trial strategy.' United States v. McDaniel, supra, 482 F.2d at 311. . ." (emphasis added).

In the post-trial hearings held in the instant case before the district court, the chief government prosecutor acknowledged that there were numerous discussions with his SEC attorney as to what

position the petitioner would take at time of trial and what his prospective trial testimony would be, and, as a result, he sent the SEC staff attorney assigned to assist him in the case to obtain a copy of the bankruptcy testimony of the petitioner. In addition, of course, the same SEC attorney admitted reading two volumes of relevant testimony of the petitioner's 1973 testimony. Thus, the Government cannot overcome its heavy burden of establishing non-use as mandated by United States v. McDaniel, 482 F.2d 305, 311-312 (8th Cir. 1973), and Kastigar v. United States, 406 U.S. 441, 32 L.Ed.2d 212, 92 S.Ct. 1653 (1972).

Petitioner believes that a subtle erosion of the protection of the Fifth Amendment to the Constitution has occurred

since the enactment of the use immunity provision of the Organized Crime Control Act on which the bankruptcy immunity relies.

Prior to its enactment, immunity was 'transactional' and forever barred criminal prosecution, except for false affirmation under oath in an appropriate proceeding. See 18 U.S.C. Sections 2514, 1406, 3486. Since the enactment of the use immunity provisions of the aforementioned statute, prosecutors have become bolder in skirting the grant of such immunity, with the ever difficult task of a showing of prejudice as a practical matter being shifted to the defendant in an evidentiary hearing. Indeed, in the case of bankruptcy immunity, which is subject to the prying eyes of any number of

interested parties, the self-incrimination protections accorded our citizens disintegrate even further.

The substantial interest of preserving the integrity of the Fifth Amendment privilege requires this Court to set the strictest guidelines for the sealing of such testimony if any criminal prosecution is to go forward. In the case at bar, of course, the record below supports an egregious abuse of any proposed seal, and cries out for dismissal.

CONCLUSION

For the foregoing reasons, this Petition For A Writ Of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1061-2—September Term, 1976.

(Argued March 16, 1977 Decided July 22, 1977.)

Docket Nos. 76-1435, 76-1440

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOHN M. KING and A. ROWLAND BOUCHER,

Defendants-Appellants.

Before:

LUMBARD and TIMBERS, *Circuit Judges,*
and DAVIS, *Judge, Court of Claims.**

Appeals from judgments of conviction for securities fraud (15 U.S.C. § 78j(b)), mail fraud (18 U.S.C. § 1341)), wire fraud (18 U.S.C. § 1343) and conspiracy to commit those offenses (18 U.S.C. § 371), entered in the Southern District of New York, Marvin E. Frankel, *Judge,* after a jury trial.

Affirmed.

MICHAEL F. ARMSTRONG, New York, N.Y. (Warren H. Colodner and Barrett, Smith, Scha-

* Sitting by designation.

piro & Simon, New York, N.Y., on the brief), *for Defendant-Appellant King.*

ANDREW J. MALONEY, New York, N.Y. (Norman Arnoff and Maloney, Viviani & Higgins, New York, N.Y., on the brief), *for Defendant-Appellant Boucher.*

JOHN R. WING, Assistant United States Attorney, New York, N.Y. (Robert B. Fiske, Jr., United States Attorney for the Southern District of New York, Paul Vizcarrondo, Jr., and Lawrence B. Pedowitz, Assistant United States Attorneys, New York, N.Y., on the brief), *for Plaintiff-Appellee.*

DAVIS, *Judge:*

After a six-week trial in the Southern District of New York before Judge Frankel and a jury, appellants John M. King and A. Rowland Boucher were convicted on an indictment charging four counts:—one of securities fraud (15 U.S.C. § 78j(b)) and related counts of mail fraud (18 U.S.C. § 1341), wire fraud (18 U.S.C. § 1343), and conspiracy to commit those substantive offenses (18 U.S.C. § 371). King was sentenced to concurrent terms of one year's imprisonment on three of the counts, to be followed by three years of unsupervised probation on the mail fraud count. Boucher's sentence was to seven months concurrently on three counts, and thereafter also to three years unsupervised probation on the mail fraud charge.

Since appellants do not challenge the sufficiency of the evidence we do not set it out in detail; the barebones will suffice for the most part. The main institutional actors in the case were King Resource Co. (KRC), a Denver-based public company primarily engaged in selling oil, gas and

other natural resource interests, and the Fund of Funds (FOF), an open-ended Canadian mutual fund, Geneva-based, which was managed over-all through Investors Overseas Services (IOS), a Bernard Cornfeld company. King and Boucher were Chief Executive Officer and President, respectively, of KRC. In 1968 KRC (through King and Boucher) agreed with FOF to sell undivided interests in oil and other resource properties to FOF at a cost comparable to that charged KRC's other customers. During the next two years FOF because KRC's most significant customer, purchasing approximately $53,000,000 in such properties. The main holding involved in this case was a 50 percent undivided interest in some 22 million acres of oil and gas permits (with the potential of becoming leases) in the Canadian Arctic, bought by FOF from KRC for about $11 million.

FOF periodically revalued its investments in order to determine their "net asset value" (for the sale and redemption of its shares) and to pay IOS, the investment advisor, which was entitled to a commission on any appreciation of FOF's assets. One way in which this kind of revaluation was accomplished was by a sale of a small portion of the particular FOF asset. In 1969, after King and Boucher had advised FOF that the Canadian Arctic oil-and-gas holdings had substantially appreciated, FOF decided to revalue that property and asked King to arrange such sales (on FOF's behalf) of 10% of the FOF interest; it was understood that the sales had to be *bona fide* and arms-length so that they could be used to ascertain the correct market value of FOF's Arctic interests. Thereafter, at the end of 1969, sales were arranged by King and Boucher for about $15 an acre, more or less—sales which appeared on their surface to be genuine. On the basis of these sales FOF's Arctic holdings were revalued very sharply upwards.

The core of the prosecution's case was that these sales, which seemed to be *bona fide* and arm's length, and were so represented by appellants, were collusive transactions in which appellants arranged to supply the purchasers with the funds to buy the property and also agreed to buy the permits back if the purported vendees so wished. The two sales on which the case centered and which the court's charge presented to the jury were one to John Mecom and another to Consolidated Oil and Gas Co. (COG).

For the Mecom sale—as to which the prosecution's proof was stronger—the Government's evidence supported the following indicators that the transaction was not a genuine one on which a proper revaluation of FOF's Arctic properties could be grounded (we use the summary which the court's charge gave the jury of the Government's contentions on this point):

(1) That Mecom would be assured of net cash receipts from business with KRC or with King-related companies in the form of drilling work in the Arctic or elsewhere sufficient to supply him with profits for the payments called for under his contract for that purchase of the FOF interests.

(2) That Mecom would be advanced by KRC or a King-related company the money needed to make the down payment of something in excess of $260,000.

(3) That Mecom would not be obliged to pay any money out of his own pocket other than moneys advanced to him by KRC or obtained by him from KRC to King-related companies.

(4) That King or a King-related company would at Mecom's request buy back the Arctic interests and hold

Mecom harmless from any obligation to make the payments that purported to be due under the sales agreement.[1]

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1 In greater detail, the prosecution's proof showed the following for the Mecom sale:

Late in 1969 King approached Mecom through Hulsey, a friend of Mecom's and a KRC employee. Hulsey testified that King told him to offer Mecom a buy-back arrangement for a sale of the Arctic interests but that Mecom was hesitant because of lack of liquid funds. Hulsey stated that in late December 1969 Boucher sent him to Houston with a sales contract for Mecom and explained that an additional agreement would be arranged later and would provide for a "repurchase agreement" and an "agreement to provide work." Hulsey told Marriott, Mecom's attorney, that Mecom would not have any personal liability, that payments under the sales contract would be made from profits earned by KRC employing Mecom's drilling rigs, and that if Mecom was unsatisfied, King would buy the interests back. The sales contract provided that Mecom was to pay $7.50 per acre cash plus an additional $7.50 per acre in work obligations for 347,883 acres (about 3 per cent of FOF's holdings). Mecom and Marriott did not want to sign the contract because it was a straight sales agreement, and did not contain Hulsey's guarantees. It was then agreed that Mecom would sign but that Hulsey would not release the contract until Marriott received a supplemental agreement incorporating Hulsey's promises. Hulsey testified that he then returned to Denver and that the contract was removed from his desk and was given to Boucher's secretary.

Lowry, KRC's general counsel, testified that after speaking with King, he prepared a letter agreement, an unsigned copy of which was sent to Marriott along with a note indicating that Lowry would retain the original, which had been signed by King. Lowry stated that he destroyed the original in January 1972, when his offices were moved. What was apparently Marriott's copy and the accompanying Lowry note were produced at the trial. The letter confirmed the sales contract, promised to provide sufficient payments to be made to Mecom to meet all payments on the sales contract through October 1971, and further provided that King would accept an assignment of Mecom's liabilities and interests under the sales contract any time between October and December 31, 1971.

Mecom's downpayment on the sales contract, approximately $260,000, was due on January 2, 1970. Boucher and Hulsey arranged, with King's authorization, to forward $275,000 to Mecom through a Colorado Corp. subsidiary (Colorado Corp. was a King-controlled company). On January 22, 1970 Marriott received a check for $275,000 and arranged for the proceeds to be used to cover the $260,000 downpayment. Appellants claim this money was an advance on an arrangement to use one of Mecom's drilling rigs. Mecom never received any drilling contracts from KRC (apparently because his equipment was unsuitable or unready).

Capping the fraud, in the Government's presentation, were 1970 letters to FOF's auditors, signed by both appellants, representing that the Mecom and COG sales were both arm's length and *bona fide,* that no buy-back agreements were involved, or any guarantee to the purchasers of the economic results of the transactions. These letters were written prior to FOF's revaluation of the property and as part of that process.

Defendants, who took the stand, denied that any of the arrangements they entered into with Mecom or COG was underhanded or lacking in full good faith, denied that there were any buy-back agreements integral to the sales as made, and asserted that any arrangements by which money was supplied to Mecom (or to COG) were pursuant to independent and legitimate business transactions, not designed as secret inducements or side-deals in connection with the Arctic purchases by Mecom or COG. They maintained that the representation letters to FOF's auditors were not fraudulent but accurate characterizations of the Mecom and COG transactions.

Though appellants do not argue sufficiency, they insist that the prosecution's case was very thin, and that we must bear that in mind in appraising the various trial and evidentiary points urged upon us. Judge Frankel, on the other hand, writing on the defendant's post-trial motions, pointed out that "the jury's deliberations were notably swift. It seemed evident that the evidence for conviction was clear and overwhelmingly persuasive." He also found "the proof of guilt powerful to the point of near certainty," that "the court is convinced beyond a reasonable doubt, as the jury must have been to convict, that the defendants swore falsely at key junctures in their testimony," and that "the testimony of some 49 witnesses and the large volume of exhibits appear convincingly to justify as reli-

able and accurate the conclusions the jury declared it had reached beyond a reasonable doubt."

From the record as well as the written and oral presentations made to us, we have no reason to disagree with the trial judge's view that the Government's case was strong. It was based, in large part, on the direct testimony of participants in the relevant transactions plus some telling documenatry materials—to which was added the cement of common sense and human experience. It is in this light that we must evaluate the contentions for reversal which we now take up. *See United States* v. *Ong*, 541 F.2d 331, 334 (2d Cir. 1976).

The Mecom Bankruptcy Documents

John Mecom was, as we have said, the purchaser in one of the two revaluation sales the Government challenged as lacking in *bona fides*. Some months after that transaction he went into bankruptcy. As a Government witness, Mecom testified that he did not have the money to buy the Arctic interest to be sold to him but that King (or a King company) would supply the cash through a business deal, and would also buy back the property later on if Mecom wished. At the close of his cross-examination by King's counsel, the latter offered more than 200 pages of official documents relating to Mecom's bankruptcy. The stated purpose of the offer was to show that "there are representations made in these bankruptcy papers as to the Arctic contract, in which it is treated in the bankruptcy papers as a legitimate, binding contract, with no mention of any side agreements or anything having to do with any side agreements, up to a certain point in the bankruptcy, where the further papers show that there was a contest made for the first time where the contract was challenged, but not on the grounds that have been testified about in

these proceedings." However, no specific parts of the bundle were pointed out to court or jury as inconsistent with Mecom's testimony—but it was and is clear that only a relatively small number of excerpts bore at all on those subjects. Nevertheless, the whole "sheaf of papers" was then summarily received. Without any further substantial cross-examination of Mecom on the documents, counsel concluded cross-examination.

On redirect the prosecutor elicited from Mecom that he had prepared none of the 10 exhibits, that the papers had been prepared by his attorneys and accountants and he was generally ignorant of their contents, and that only three exhibits contained documents bearing his signature. Based on this redirect, the Government then moved to exclude the documents. Defense counsel responded with a voir dire bringing out that Mecom had apparently read the documents he signed and that where a contractual liability was disputable his lawyers would discuss the matter with him. Again, no specific parts of the exhibits were segregated out as inconsistent with Mecom's testimony; counsel did say, however, that he would be willing to excerpt the relevant portions and make a sub-exhibit. The court then granted the prosecution's motion to exclude, primarily on the ground that defendants had not yet indicated the claimed inconsistencies and had not sought to use the allegedly pertinent portions in cross-examination. A short while later, defense counsel again attempted to have the documents admitted; he explained that his intention had been to read to the jury the specific portions said to be inconsistent with Mecom's testimony but that he now realized that he should have brought out more from Mecom, and that at this point he merely wanted to go through certain of the documents with the witness, especially the signed ones, in order to bring out that the Arctic contract was

listed in the bankruptcy proceedings without any question or reservation. In this connection counsel said: "I did not feel that I wanted to question the witness at great length about something that was obviously prepared by his attorneys but he swore to it. I was not going to make any big point about the fact that he prepared it or sweated over it." Emphasizing that the defense had twice foregone the opportunity to point out the alleged inconsistencies, to explain the relevance of this mass of official documents, and to connect Mecom with those contradictions, and noting that "even as you put it now at most these [papers] are of modest potential relevance in this case," the court adhered to its ruling of exclusion.

On this appeal, appellants have blown up this exclusion as a major error affecting their opportunity to break down the Government's case. We do not so see it. The defense has now suggested all kinds of uses to which these bankruptcy documents could have been put at the trial (including extensive cross-examination of Mecom on various scores) but the record is clear that (a) the only purpose suggested for the admission of the papers was that they incorporated prior inconsistent statements of Mecom; (b) appellants' counsel never got down to singling out for the court or jury the particular portions of the documentary packet on which he relied for this purpose; (c) counsel twice refrained from cross-examining Mecom as to these inconsistencies when he had the chance; (d) even at the end of the effort to get the papers admitted, counsel obviously did not wish to cross-examine Mecom extensively or thoroughly on the basis of the papers but primarily wanted to read portions to the jury with only the lightest of explanation from Mecom; and (e) the record, as the defense left it, showed that Mecom's personal connection with the bankruptcy documents, to the extent there was any at all, was far from deep.

In these circumstances Judge Frankel was within his discretion to exclude the evidence. Counsel was very tardy in offering to point out and segregate the few relevant portions of the large file. *See Trade Development Bank* v. *Continental Ins. Co.*, 469 F.2d 35, 44 (2d Cir. 1972). Even then, the plan was to read selected excerpts to the jury without drawing from Mecom any substantial background for or explanation of the asserted contradictions. Judge Frankel was surely right in referring to the "modest potential relevance" of the alleged inconsistencies since there were several reasons why Mecom and his lawyer-and-accountant aides might not wish to mention the side-agreements with appellants in the bankruptcy papers. FED. R. EVID. 403 authorizes a trial judge to exclude even relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury * * *." In view of the official nature of the documents (the judge referred to "red seals and ribbons") with their possible untoward effect on the jury, the prolonged failure to pinpoint the small portions which were at all pertinent, counsel's refusal to explore the relationship between the submission of the papers to the bankruptcy court and Mecom's testimony in this case,[2] and the minor probative force of the evidence, the exercise of discretion under Rule 403 was available and could properly be used.

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2 Under Rule 613 of the Federal Rules of Evidence, dealing with the admissibility of extrinsic evidence of a witness's prior inconsistent statement, the defense was not itself required to confront the witness with the statement or to give him an opportunity on cross-examination to explain—so long as the witness was afforded in some fashion an opportunity to explain or deny. However, that does not mean that in this instance the defense was not called upon to explore the matter further with Mecom in order to avoid exclusion under Rule 403 for "unfair prejudice, confusion of the issues, or misleading the jury." Rule 613 and Rule 403 fulfill separate functions. Although admissible under 613 the papers could be excluded under 403.

In any event, three of the excluded bankruptcy documents were later admitted, one of which defense counsel's summation put to the jury as demonstrating the very inconsistency he had stressed in trying to have the documents admitted during Mecom's testimony. If the subexhibit (containing the alleged inconsistencies) which counsel belatedly asked leave to submit had been accepted, the defense would not have been in a materially better position since, as we have stated, the course counsel wished to follow was to read and argue from the bankruptcy documents in just this fashion. We find no support for the strained argument that the court's prior handling of the problem of the bankruptcy papers so prejudiced the jury that any defense argument in summation (based on the documents) could not be effective.

Pre-indictment Delay

The indictment was brought in January 1975, towards the end of the limitations period but within it. Appellants claim, under *United States* v. *Marion*, 404 U.S. 307, 324-25 (1971), that they were deprived of due process by the delay between the occurrence of the alleged criminal acts and the beginning of the case. This issue was twice considered by the District Court, once before trial and, again, after trial. On the basis of extensive affidavits and documentation, Judge Frankel decided each time that there was insufficient merit in the point. In his post-trial ruling he concluded that "defendants show neither intentional delay for tactical advantage nor measurable prejudice • • •." Appellants suggest no adequate ground for overturning this considered determination.

A recent Supreme Court decision has clarified the principles underlying a finding that a pre-indictment delay violates the Due Process Clause. *United States* v. *Lovasco*,

U.S. Sup. Ct. No. 75-1844, decided June 9, 1977, 45 U.S. L.W. 4627. The Court first ruled that "proof of prejudice is generally a necessary but not sufficient element of a due process claim, and that the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused" (45 U.S.L.W. at 4629); then held that the prosecutor does not go against due process by refusing to seek indictments "until he is completely satisfied that he should prosecute and will be able promptly to establish guilt beyond a reasonable doubt" (45 U.S.L.W. at 4630); and concluded that "to prosecute a defendant following investigative delay does not deprive him of due process, even if his defense might have been somewhat prejudiced by the lapse of time" (45 U.S.L.W. at 4630-31). The Court indicated, however, as it had in *Marion,* that a "tactical" delay by the prosecution would violate the Constitution and implied that the same could well be true for a reckless disregard of the defendant's rights (45 U.S.L.W. at 4630, fn. 17).

Appellants' contention is that, as early as 1971-72, the Securities and Exchange Commission had enough facts to warrant a further investigation and a speedier indictment. It may well be that in those years the S.E.C. received information giving it probable cause to believe that both the Mecom and COG transactions were suspect, incorporating secret buy-back agreements.[3] But *Lovasco, supra,* explicitly teaches that prosecution need not, should not, follow where the Government merely has probable cause. It was not until July 1973 (after an attorney for FOF's successor went directly to the S.E.C. Director of Enforcement) that the S.E.C. initiated a full formal investigation into the Arctic deals (with one investigator). Meanwhile, the Den-

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3 However, the S.E.C. did not then have adequate information as to appellants' representations in 1970-1971 to FOF's auditors.

ver office of the agency was heavily involved in investigating other of appellants' transactions of which it had earlier learned, but the S.E.C. cannot be faulted, in view of the limitations on its budget and staff, for concentrating on those other aspects, especially since the Arctic information available to it, though suggestive, was by no means conclusive. Similarly, the United States Attorney's Office in Denver was centering on these other phases of appellants' activity. At the very least, we find no basis whatever for thinking that the S.E.C.'s delay in starting to investigate the Arctic transactions, or the Department of Justice's judgment regarding priorities during this earlier period, was "tactical," intended to deprive the appellants of their rights of defense, or reckless of those rights. After the formal investigation began in the summer of 1973, an extensive inquiry was had, involving more than 80 interviewees and thousands of documents. The case was referred to the Department of Justice for possible prosecution in September 1974, and considering the complexity of the matter the indictment was promptly returned in January 1975.

The upshot is that, in our view, the period since July 1973 certainly fell within the type of "investigative delay" which *Lovasco* held not to deprive an accused of due process.[4] The prior time from 1971 to the middle of 1973, though not taken up with investigation focused on the Arctic, should likewise not be counted against the Government. During that period the federal agencies (S.E.C. and the Justice Department) plainly did not have nearly enough evidence to prove guilt beyond a reasonable doubt; they were not required to divert their energies from the

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4 The Court held in *Lovasco* that a prosecutor could delay, even after he had developed the minimum evidence to prove guilt beyond a reasonable doubt, so long as he was continuing his investigation in good faith to firm up his case.

other inquiries to delving into appellants' Arctic transactions; and they were neither attempting "to gain tactical advantage over the accused," *United States* v. *Marion, supra,* 404 U.S. at 324, nor knowingly reckless of the risks to appellants in delaying prosecution. No plausible reason has been given us why the Government would have, or had, any purpose in 1971-1973 other than to concentrate on the separate investigations (into appellants and KRC) which at the time seemed to it much more likely to reveal provable wrongdoing; there is no substantial indication that placing the Arctic transactions "on hold" for that period was designed to injure appellants or harm their defense. When FOF's successor management brought the matter forward again in 1973, the S.E.C. stepped up its interest and the formal investigation began and proceeded in due course.

The other facet of appellant's presentation on this point is that they were substantially prejudiced by the lapse of time. As we have pointed out, *Lovasco* countenances some prejudice due to *bona fide* investigative delay. Judge Frankel said, after the trial, that he had "a definite conviction that defendants were not injured to any material extent by the lapse of time." Giving weight to this appraisal by the trial judge, we too find that any delay-prejudice appellants may have suffered did not deprive them of due process. They stress the death in June 1974 of Edward Cowett,[5] a high functionary of FOF, but are basically unable to say with any specificity or assurance what he would have said on the stand or how his testimony would have aided their case. We see no reason to believe that his testimony, if he were called, would have helped appellants. Cowett had, as far as the record re-

5 *Lovasco,* which held that no due process violation had been shown, involved the death (during the pre-indictment delay) of two persons said by the accused to be material witnesses for him.

veals, nothing to do with any side-arrangements between appellants and Mecom or COG. On that, the heart of the case, he could have added little or nothing. Although there are materials suggesting the contrary, he may conceivably have known and approved the profits KRC generally made on its continuing sales of property to FOF, but if that were the corporate view of FOF appellants could and should have called Bernard Cornfeld, or other officers or directors of FOF, to show it.[6]

Another claim of prejudice is through the absence of two documents destroyed in ordinary course during the pre-indictment period. One was the original of the written buy-back letter agreement with Mecom (which had been retained by King's lawyer and later disposed of as no longer in effect), there being produced at the trial only unsigned copies which appellants challenged as inaccurate and never seen or authorized by King. Their main position is that if the original was also unsigned it would have tended to corroborate their contention that such a secret pact was never put into effect. This may possibly be so but we think that, against the weight of oral and written evidence showing that King actually made such a side buy-back agreement, the loss of this original was too slight and too conjectural a prejudice to warrant dismissal of the indictment for delay for which the Government cannot properly be faulted under *Marion* and *Lovasco*. Also lost were the notes taken at the time by a newspaper reporter of a conversation with a high officer of COG in which the latter declared that he had a buy-back arrangement with KRC. This loss seems insignificant since the reporter's

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6 Cowett's evidence was not wholly lost because his 1970 grand jury testimony—given in another connection but including a part of the general relationship between KRC and FOF—was read to the jury at appellants' request.

story was published the next day, and he was available at the trial for full cross-examination.

We have also considered the other instances of claimed prejudice, all of which were discussed extensively by both parties in the presentations made to the court below and here again, and again we find them too speculative, too peripheral, and too slight to call for dismissal. We mention only (a) the assertion of diminished recollection, a type of general prejudice which this court has already rejected, *United States* v. *Finkelstein*, 526 F.2d 517, 526 (2d Cir. 1975), *cert. denied, sub nom. Scardino* v. *United States*, 425 U.S. 960 (1976); *United States* v. *Payden*, 536 F.2d 541, 544 (2d Cir. 1976) and (b) appellants' claimed lessened ability to assemble evidence from the KRC files, a general allegation unsupported by a showing of what such documents could be or why they were not subject to subpoena. The result is that, on the whole case, appellants have failed to show such substantial prejudice, considering that the Government was not at fault in the delay, as to require dismissal of the indictment.[7]

Immunization Because of Bankruptcy Testimony

Appellants both urge that the prosecution improperly used bankruptcy testimony given by them under a statutory grant of immunity—King during his personal bankruptcy proceedings in 1971 and 1973, Boucher, in 1971 and 1973, with respect to KRC's reorganization. This point

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7 This court has upheld several convictions with comparably lengthy pre-indictment delays. *See United States* v. *Schwartz*, 535 F.2d 160 (1976); *United States* v. *Eucker*, 532 F.2d 249, 255 (1976), *cert. denied sub nom. Anderson* v. *United States*, 429 U.S. 827 (1976); *United States* v. *Ferrara*, 458 F.2d 868, 875, *cert. denied*, 408 U.S. 931 (1972); *United States* v. *Iannelli*, 461 F.2d 483, 485, *cert. denied*, 409 U.S. 980 (1972); *United States* v. *Feinberg*, 383 F.2d 60 (1967), *cert. denied*, 380 U.S. 1044 (1968).

was likewise gone into twice by the trial judge, before trial in written submissions (including affidavits) and after trial by further extended written presentations and an oral hearing. The gist of the Government's response was that only the S.E.C. attorney-investigator, not the United States Attorney's staff, had looked at this bankruptcy evidence and then only at some of it—and that there were independent sources for all the Government's material used to obtain the indictment or offered at the trial. Judge Frankel found post-trial, "a totally convincing demonstration by the prosecution that there was no use or derived use of the kind defendants posit. Clear, specific and credible accounts are given to display the untainted sources of the Government's witnesses and other evidence. Cross-examination [of the S.E.C. attorney] has not served to impair the persuasive showing made by the Government on this subject." The judge assumed that the prosecution has a heavy burden to disprove taint and held that burden met.

We have no reason, after reviewing the record, to question the court's conclusion. The investigation below into possible taint was thorough and exhaustive, there is no claim that the Government failed to make full disclosure, the appellants had a full and fair opportunity to break down the Government's showing but failed to make a significant dent.[8] Because the prosecution already had independent sources for its full case, Boucher is wrong in claiming taint merely because the S.E.C. attorney, after the indictment in order to see what kind of witness this appellant would make, read Boucher's 1971 bankruptcy testi-

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8 King says that the Government should have had transcribed certain of his bankruptcy testimony which was left untranscribed. Aside from his lateness in making this request, it was his obligation, which he did not fulfill, to show that prima facie the untranscribed testimony concerned matters related to the prosecution. *Kastiger* v. *United States*, 406 U.S. 441, 460 (1972).

mony (*see United States* v. *Bianco*, 534 F.2d 501, 514 n.14 (2d Cir.), *cert. denied*, 429 U.S. 822 (Oct. 5, 1976)). The same is true of the Government's mere possession somewhere in its files of Boucher's 1973 bankruptcy testimony.[9]

Refusals to Charge

Boucher says that the court erred in refusing to charge his defense that he relied on counsel in signing the representation letters to FOF's auditors. There are multiple defects in this claim. Boucher's position throughout the trial was that he knew nothing of any side-deals or buy-back arrangements with either Mecom or COG; it is very hard to see how in those circumstances a defense of reliance-on-counsel, which goes to unlawful intent not knowledge of the facts, could have any relevance. *See, e.g.*, *Powell* v. *United States*, 513 F.2d 1249, 1251 (8th Cir.), *cert. denied*, 423 U.S. 853 (1975). Second, Boucher specifically testified on cross-examination that he did not recall relying on counsel before signing the representation letters; thus, there was no factual predicate for the requested instruction. Third, there was no showing that before he relied on counsel, if he did, he gave the lawyer all the relevant facts as to the Arctic transactions. *See Bisno* v. *United States*, 299 F.2d 711, 720 (9th Cir. 1961), *cert. denied*, 370 U.S. 952 (1962). Lastly, significant representations were made as to specific facts (*e.g.* that there were no buy-back agreements) and as to those we cannot understand how a businessman who knows that such factual representations are untrue can screen himself by trying to

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9 Because we find no taint with respect to any of the evidence used by the prosecution, we need not consider the point that Boucher's 1973 testimony under Section 167 of the Bankruptcy Act, 11 U.S.C. § 567, did not grant him immunity.

rely on advice of counsel. *See Williamson* v. *United States*, 207 U.S. 425, 453 (1908).[10]

The only other attack respecting the charge is the refusal of the court to tell the jury that "if you do not fully understand the nature of the proof or the charges against either defendant, then you must acquit the defendant". In this case, with its components of financial and technical proof, much of it peripheral to the core issue of the Mecom and COG transactions, a sweeping charge of that kind was obviously inappropriate. The court gave unexceptionable instructions on reasonable doubt and burden of proof, and rightly centered its instruction on the paramount question of the *bona fides* of the Mecom and COG sales. The jury received the necessary guidance from the court to help it separate out the wheat.

Admission of Evidence as to the Profitability of KRC's Business with FOF and of Loss to FOF from the Mecom and COG Transactions

The Government spent some time putting in evidence—through an S.E.C. accountant and a number of charts drawn from the books and records of KRC and King-related companies—of the profitability of KRC's business of selling undivided interests in natural resource properties to FOF.[11] Since appellants did not make any direct profit from the revaluation sales to Mecom and COG, the Government wanted to show the appellants' motive for arranging those tainted transactions. That motive, as the prosecution presented it, was to enable KRC to demonstrate to FOF that the former's continuing project of sell-

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10 It is noteworthy that, although no charge was given on the point, defense counsel suggested the defense in his summation.

11 Including the profits from the business of Colorado Corporation, a King-controlled (and mostly King-owned) company.

ing properties to FOF was to the latter's financial advantage, thereby inducing FOF to prolong its program of purchasing from KRC (which was to KRC's great benefit).

It is in the trial judge's discretion to admit evidence suggesting the defendants' motive for the crime charged. *Moore* v. *United States*, 150 U.S. 57, 60-61 (1893); *United States* v. *Fernandez*, 497 F.2d 730, 735-36 (9th Cir. 1974), *cert. denied*, 420 U.S. 990 (1975). The evidence objected to was carefully limited by the court to the question of motive for the allegedly sham sales to Mecom and COG, and the jury was instructed not to consider it as showing that KRC fraudulently overpriced its own sales to FOF. Appellants insist that nevertheless the evidence was highly prejudicial because it led the jury to consider them "bad men" who simply ought to be punished for milking FOF through high prices. We cannot accept this complaint. The information was highly relevant to the case; it explained why appellants would do what they were said to have done. The prosecutor's summation stressed KRC's financial interest but he tied it directly to the Mecom and COG sales as showing the motive why they were planned. Above all, the court kept the jury on the track in its instructions, in a specific direction as this evidence came in, as well as in the final charge. We do not think the jury was permitted to avoid confronting the summit issue of the Mecom and COG sales by sliding down the tempting slope that appellants were conviction-worthy simply because they were financial highbinders.

Appellants also say that the Government's presentation on this point was both excessive and inaccurate. Neither the time taken (half-a-day in a six-week trial) nor the amount of the evidence was immoderate, especially since appellants had refused (despite the judge's urging) to stipulate to sales and gross profits figures, and their summary concession of the profitability to KRC of the

FOF business came out subsequently in defendants' case (through the testimony of King). The claimed inaccuracy is that the Government's evidence, using gross profit figures, failed to take account of substantial indirect costs of KRC. The presentation followed the way in which KRC and Colorado Corporation kept their books, and appellants had full opportunity to challenge the correctness of the prosecution's calculations and to offer their own. *See United States* v. *Kyle*, 257 F.2d 559, 563-64 (2d Cir. 1958), *cert. denied*, 358 U.S. 937 (1959). The judge was not required to exclude the Government's evidence, based as it was on the books of KRC and KRC-related companies, because the defendants disputed that it accurately reflected the amount of KRC's and appellants' gain.

In the same vein, defendants challenge certain proof used by the prosecution to tell the jury that shareholders of FOF suffered a loss as a result of the fraudulent revaluation of the Arctic properties. There was evidence that in 1970 FOF faced a liquidity crisis because of the combination of the fact that a large percentage of its assets were the illiquid natural resource properties sold it by KRC and Colorado Corporation, together with the fact that large numbers of FOF shareholders redeemed their shares to take advantage of the increased valuation. To alleviate the situation FOF spun off the natural resource properties to a new closed company called Global. In summation the prosecutor pointed out that before the spin-off FOF's natural resources accounted for about $11 worth of each FOF share, but afterwards Global shares sold only for $2 to $3. This comparison, it is said, led the jury to think mistakenly that the $2-3 price was all the Arctic properties were actually worth at the time, far less than the revalued figure obtained through the *mala fide* Mecom and COG sales. The prosecutor's short reference to the Global spin-off was probably too cryptic but it came in a

series of citations to other instances of damage to FOF and its shareholders, damage not susceptible to challenge as misleading; we think that the spin-off remark, to the extent it may have been implicitly inaccurate, was not so injurious or so important as to be reversible error in itself.

Exclusion of Evidence as to the 1976 Value of the Arctic Interests

The trial court precluded appellants from offering evidence on the current (1976) value of the KRC-FOF Arctic holdings. This is tagged as error because, defendants say, (a) proof of the high present value would have confirmed their belief in the properties in 1969-1970 and would have demonstrated their lack of intent to defraud, (b) proof of 1976 value goes toward showing 1969-1970 value,[12] and (c) present value demonstrates that appellants did not misrepresent in urging FOF to revalue its Arctic interests upward.

It may be that 1976 value would have some slender and marginal utility in firming up some of these propositions but Judge Frankel could properly exclude it because the complexity and delay which would be injected would far outweigh any contribution toward proving a proposition important to appellants' defense. *See* FED. R. EVID. 403; *United States* v. *Corr*, 543 F.2d 1042, 1051 (2d Cir. 1976). If the case is seen in proper framework, it is beside the point that defendants had faith in the Arctic holdings in 1969-1970, that those assets had a good potential at that time, or that in the long run FOF and its shareholders benefited from their Arctic properties. The basic accusation was that appellants knowingly misrepresented in 1969-1970 that the sales to Mecom and COG were arms-length,

12 Appellants were not prevented from showing or arguing 1968-1970 value.

including no buy-back side-deals, so as to induce FOF to revalue upward its Arctic assets. As we have stressed, the case went to the jurors under instructions expressly directing them to Mecom-COG as the focus of the fraud charged against appellants. That accusation poses an issue entirely separate from the actual value of the Arctic properties in 1969-1970, and theoretically the value of the properties in those years would not be directly pertinent. But even if one assumes that proof of 1969-1970 worth could help appellants to demonstrate that at that time they had no need, motive, or intent to concoct sham sales, disputable evidence of 1976 value is too remote and too far down the road to compel the trial judge to tolerate the additional complexities, delay, and possible confusion resulting from a side-battle over 1976 value (including the effect of the Arab oil embargo).

The MacKenzie Statement in Boucher's Presence

In January 1971 a KRC directors' meeting, attended by Boucher, considered a suit which had been threatened by COG to rescind the latter's Arctic purchase. At that meeting, Neil MacKenzie, a KRC official and head of its Calgary office, said, in answer to a query whether the price paid by COG for its Artic interest wasn't too high, that it was "ridiculous." Boucher admitted that he heard that remark and said nothing in response; his explanation (when the matter came up during his cross-examination) was that he "wasn't concentrating on this particular aspect at that time." MacKenzie's statement was admitted as an admission by silence on the part of Boucher,[13] and was used by the prosecutor to tell the jury that the price paid

13 MacKenzie was living in South Africa at the time of the trial and could only be produced, if at all, at great expense.

by COG was much too high and Boucher knew it. This is said to be prejudicial error.

The acceptance of MacKenzie's remark as an admission by silence on the part of Boucher was not incorrect. The general rule is to look at the circumstances to see whether it was more reasonably probable that a man would answer the charge made against him than that he would not. *United States* v. *Flecha,* 539 F.2d 874, 877 (2d Cir. 1976). Here, Judge Frankel could reasonably conclude that that test was met, Boucher having full opportunity to justify and explain his silence. MacKenzie was a knowledgeable official of KRC; the meeting was called to discuss what KRC should do (*e.g.* settle) about the anticipated COG lawsuit; MacKenzie's comments were serious ones about a matter in which Boucher had been and was directly involved, and they had a plain bearing on the course KRC should take on the COG suit; Boucher did comment on certain of MacKenzie's other statements but not on the observation that the price was "ridiculous." We cannot say that the court exceeded its discretion in allowing the jury to have this information.[14]

Once admitted, such an admission-by-silence was not hearsay and could be taken as an admission by Boucher of his belief in the statement and its truth. *See* FED. R. EVID. 801(d)(2)(B). This was how it was used by the prosecutor in his argument. MacKenzie's view was not admitted or urged upon the jury as expert testimony; the Government, in suggesting that Boucher accepted MacKenzie's valuation, simply pointed out that in Boucher's own mind

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14 We read *United States* v. *Lam Lek Chong,* 544 F.2d 58, 65 n.8 (2d Cir. 1976), as holding no more than that, in the very different circumstances of that case, the *Flecha* rule was not met.

MacKenzie was a good judge of the level of the price COG paid.[15]

The conclusion we have reached, after carefully examining all the issues presented by each appellant,[16] is that none of them, singly or in combination, calls for reversal of either of the convictions.

The judgment as to each appellant is affirmed.

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15 King complains that MacKenzie's remark, although admitted only against Boucher, was improperly used against King as well in the Government's arguments to the jury. That summation, however, linked the remark to Boucher alone, and King's counsel had the opportunity to point out in his answering summation that King was not present or bound by MacKenzie's statement.

16 Although appellants, who are Denver-based, have made scattered reflections on the difficulties and unfairness of trial in New York, they have not raised in this court (though they did below) the refusal of the District Court to transfer the case to Denver or the due process unfairness of requiring them to stand trial in New York. If the case had been transferred to Denver it is almost certain that it would have had to be moved again because of intense publicity there.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	75 Cr. 70 (MEF)
- v -	:	MEMORANDUM ON DEFEND-
JOHN M. KING and A. ROWLAND BOUCHER,	:	ANTS' POST- TRIAL MOTIONS
Defendants.	:	

FRANKEL, D. J.

With characteristic thoroughness and scholarship, defense counsel have moved after verdict for judgments of acquittal and/or dismissal of the indictment. The court has concluded that the motions should be denied. Some of the issues thus determined, together with reasons for this result, are as follows.

1. Renewing a contention pressed before trial, defendants say the indictment should be dismissed for wrongful and prejudicial delay in presenting the charges to

a grand jury. The point is urged earnestly, ingeniously, and at length. It is, nevertheless, no more impressive now than it was before the case was tried.

After a trial of some six weeks, the jury's deliberations were notably swift. It seemed evident that the evidence for conviction was clear and overwhelmingly persuasive. As defense counsel recalls in the present motion papers, defendants' "credibility was a critical issue in the case." (Affidavit of Michael P. Armstrong, Esq., sworn July 22, 1976, p. 29.) The problem was not failure of memory in any significant respect. Rather, viewing the central matters covered in defendants' testimony, their problems were (a) occasional failures of memory that were incredible and, more importantly, (b) sworn recollections and denials that were at least equally incredible in themselves and in the setting of the record as a whole.

These inferences as to how the jury must have reasoned cannot, obviously, be drawn with certainty. They reflect in at least some measure the court's own appraisal of the record. The court does indeed find the proof of guilt powerful to the point of near certainty. And the court is convinced beyond a reasonable doubt, as the jury must have been to convict, that the defendants swore falsely at key junctures in their testimony. These basic observations on the state of the record are of consequence now for assessing defendants' claims that evidence lost to them by the passage of time could plausibly be imagined to have made a difference in the outcome.

Before adding a few words on that, the court notices defendants' condemnatory descriptions of the delay in indicting. Basically, the argument is that the SEC was "on notice" by early 1971 of facts

and evidence that should have led to a formal order to investigate the matters here involved well before the order actually issued on July 24, 1973, which led to the indictment herein. There is no doubt, with hindsight, that this Arctic exploration might have followed from information possessed by or available to SEC staff members. It is equally clear, however, and entirely reasonable that they were so busy with other activities of defendant King and his enterprises that the Arctic problems now before us stayed out of focus until 1973. And what is still clearer is the entire absence of any devious or otherwise improper conduct accounting for the delay in perceiving the Arctic misdeeds. However much defendants tend to infer or hint at on this score, the court discerns no semblance of a basis for suspicion and no ground for inquiry into the behavior of government investigators or prosecutors.

Similar observations apply to criminal investigations by the United States Attorney and a grand jury in Denver in 1973. There is no doubt there were similarities and relationships between the matters explored there and the transactions on which defendants have been convicted here. Equally beyond doubt, the instant transactions are separate and distinct from those pursued in Colorado. The Colorado prosecutor had, or had access to, some of the evidence and witnesses embraced in our trial record. At least as impressive is the catalogue of key witnesses and materials in the instant case unknown or unavailable to the Colorado investigators.

There is in sum no basis for imputing to the Government "fault" in any possibly pertinent sense for the delay in proceeding to indict the defendants.

The argument for setting aside the convictions and dismissing for pre-

indictment delay is not stronger in its remaining material aspect, the claim of prejudice. It is never a good thing to have long delays between events and the effort to reconstruct them in lawsuits. Memories do fade. People die. Things are lost. Several instances of such regretable losses exist in this case. Viewed in perspective, however, they comprise no substantial picture of injury to the defendants in fighting the charges against them. It is not necessary to track each of the items of lost or faded evidence defendants say they would or might have had if the case had been brought earlier. The specific items are treated by the Government in a response the court finds sound and sufficient in substantially every detail. (See affidavit of John R. Wing, Esq., sworn August 2, 1976, pars. 14-31.) It is sufficient to note that many of the claims thus refuted are improbable

and conjectural to a large degree, most notably the things defendants "believe" the late Mr. Cowett would or might have said. Some of these speculations, aside from their improbability, go beyond any plausible rationale the defense might have invoked had the witness survived.[1] Other claims of this nature relate to details of a peripheral and subordinate character, matters that could not have been of consequence in the jury's deliberations. The whole account, seen in the light of the evidence, including defendants' own, that was available and heard, leaves the court with a definite conviction that defendants were not injured to any material extent by the lapse of time. To put the point more positively, the testimony of some 49 witnesses and the large volume of exhibits appear convincingly to justify as reliable and accurate the conclusions the jury declared it had reached beyond a reasonable

doubt.

Thus, defendants show neither intentional delay for tactical advantage nor measurable prejudice, both of which would seem requisite to their position. United States v. Eucker, Docket Nos. 75-1246, etc., (2d Cir. 3-8-76), slip op. at 2468. Their application for dismissal or, alternatively, a hearing on the claim of pre-indictment delay will be denied.

2. A second argument in which both defendants join is another renewal of a pretrial position: that use immunity or derivative use immunity they acquire under §7(a)(10) of the Bankruptcy Act, 11 U.S.C. §25(a)(10), when testifying in bankruptcy proceedings was violated in their indictment (and then in their trial) requiring erasure of their convictions and dismissal of the indictment. The position has been re-examined at length and with care. Defendants, after the trial, were given

extensive access to government files, records, and working papers. Defense counsel were permitted to cross-examine at length Mr. Thomson Von Stein, the SEC attorney who had investigated the pertinent events in 1973, had thus been instrumental in bringing about the criminal reference, and later came to assist in the preparation and conduct of the trial.[2] Accepting the credibility of the Assistant United States Attorneys who tried the case, defense counsel disclaimed any desire to interrogate them. Upon the amplified record, the court reaffirms the prior ruling.

In treating this subject, the court assumes that the defendants' failure ever to claim immunity in giving their bankruptcy testimony is not a bar to the contention now made. See United States v. Dornau, 491 F. 2d 473, 480 n.13 (2d Cir.), cert. denied, 419 U.S. 872 (1974). It is also assumed, but with far greater doubt,

that "taint" of the kind asserted could suffice to vitiate an indictment duly found and conviction so solidly supported. See id., 491 F.2d at 481 n. 15, and the reference there to United States v. Calandra, 414 U.S. 338, 345 (1974).

Proceeding from such assumptions, the court finds here a totally convincing demonstration by the prosecution that there was no use or derived use of the kind defendants posit. Clear, specific, and credible accounts are given to display the untainted sources of the Government's witnesses and other evidence. Cross-examination has not served to impair the persuasive showing made by the Government on this subject. For all their speculations before and after trial, defendants adduce no substantial grounds on which the court could reject the prosecution's position that the evidence to indict and convict was "derived from the independent sources

described in the government affidavits." United States v. Boyd, 404 F. Supp. 413, 417 (S.D.N.Y. 1975), aff'd, Docket No. 75-1393 (2d Cir. 4-15-76). This is dispositive, apart from the several alternative refutations, including the independently sufficient proposition, which the court reaffirms, that the claimed immunity was not available to defendant Boucher in any event.[3]

Defendants rely heavily upon the idea that the Government's burden to show the absence of taint is "insurmountable" or at least "virtually undischargeable" once it is shown that any government person saw any of the immunized testimony or any reflection of it. But the quoted adjectives come from a case, United States v. McDaniel, 482 F.2d 305, 311, 312 (8th Cir. 1973), where the immunized testimony, given before a grand jury, comprised three volumes (1) in which the defendant had

"fully confessed his misdeeds" and (2) which "were read in their entirety by the United States Attorney * * * when * * * [he] was unaware that the testimony came pursuant to a grant of immunity, and he therefore could have perceived no reason to segregate * * * [the] testimony from his other sources of information." Id. at 311. Assuming that the impossible burden announced in the cited case would ever be prescribed in this Circuit, the present circumstances are notably different.

Apart from the fact that none of the material was read by the prosecutors herein, and little by the SEC attorney, defendants have been notably vague and inconsistent in saying what "leads" or other uses should be thought to have come from their bankruptcy testimony. Defendant King has said substantially nothing in response to the suggestion that he be concrete and specific in this respect.

Defendant Boucher has offered some specific suggestions, but they are modest and unimpressive in the setting of the record as a whole. Indeed, defendant Boucher, not required of course to be foolishly consistent, argues in a prior branch of his post-trial motions that the Government's case against him "totally and almost exclusively relies upon the testimony of one Robert Hulsey (Affidavit of Andrew J. Maloney, Esq., sworn July 22, 1976, par. 4), obviously not derived from or traceable to the bankruptcy testimony. And both defendants have argued strenuously in another connection that the evidence against them was largely available to the Government before and apart from any bankruptcy testimony.

In sum, assuming many issues in defendants' favor, including the proposition that the Government has a heavy burden to disprove taint, the court finds the burden to have been met in this case.[4]

3. There was a pretrial motion to change the venue to Denver, Colorado. The motion was substantial. For various reasons, however, including the seemingly inevitable prospect that Denver would be only a stopping-place preceding another shift (to avoid publicity), the motion was denied. Now, defendants argue the trial in New York denied them due process.

It seems evident, as it did before trial, that the proceeding here added to the hardships defendants would have borne in Denver, or in some other city nearer to Denver than this. Nevertheless, the post-trial claims scarcely approach due process proportions; upon analysis, they add substantially nothing to what was considered before trial. Defendant King tenders a long list of "potential witnesses * * * who resided in the Denver area or points west * * *."[5] He does not say what evidence they would

have given or, more importantly, why none of them was called. Similarly, he says it would have been enormously costly to subpoena scores of potential witnesses, tendering travel expenses, but the details are again vague, and it is by no means demonstrated that any such lavish course was necessary or appropriate. Once more, the factual predicate of the motion is speculative and unpersuasive.

Even the insistent claims of financial hardship have been left as bare arguments of counsel, despite opportunities and invitations for more solid documentation. It is the court's recollection that defendants were invited during trial to give financial statements, with the understanding that assistance under the Criminal Justice Act or by other means would be sought for them if at all possible on any plausible and generous appraisal of their circumstances. Defendants chose not

to pursue this possibility, perhaps, as King's counsel now says on behalf of Boucher, because of "wrongful pride and the presence of a Denver news correspondent in the courtroom",[6] or for other humanly appealing and understandable reasons. The fact remains that mere assertions by counsel, without doubting their sincerity for a second, cannot sustain a due process argument for nullifying the verdicts in question.[7]

4. If the bounds of adversary fairness are narrower than those of love and war, it remains standard practice after conviction to charge "prosecutorial misconduct." Defense counsel, serving until recently as illustrious targets, follow the practice here at impressive length and with gusto. It seems sufficient to acknowledge that the prosecutors may have caused a blemish or two, marring the perfection for which we all strive in vain,

and that references should be eschewed from now on to what kind of defense money can buy. It is also necessary and agreeable to add that these same prosecutors displayed through a long trial wholly admirable qualities of fairness, restraint, and professional rectitude. However isolated phrases look in post-trial briefs, this is a case in which the routine assault upon the prosecutors might perhaps have been foregone.

5. Other grounds of the motions have been dealt with orally or, in any event, require no additions to this memorandum.

Defendants' post-trial motions are in all respects denied.

So ordered.

Dated: New York, New York
September 1, 1976

U. S. D. J.

FOOTNOTES

1. For example, defendants suggest that Cowett maybe would have said he "authorized" side deals with the Arctic purchasers. Armstrong Affidavit, sworn July 22, 1976, p. 34. Or, defendants continue, Cowett might have known a King company gave Mecom the $275,000 for his down payment on a supposedly arm's length sale to Mecom. While such imagined testimony might have paved Cowett's way to jail, it is scarcely the kind of probable loss from which they can now show prejudice.

2. The sentence was adjourned for about three weeks beyond the original date (which had been set for some seven weeks after the verdict) to accommodate a generous schedule for preparation, briefing, and argument, all in addition, of course, to the months available for this subject prior to trial. After the hearing and a time for still further supplemental briefing, on August 25, 1976, counsel for defendant King delivered a letter reporting the discovery of further material that might be pertinent and requesting further delay to explore the material. The court declines to extend any further the time for reolution of this motion and the imposition of sentence.

3. Boucher is not helped by a new and strained suggestion that there was an invasion of "a zone of information that achieved a sanctity comparable to the confidential communications between attorney and client." Supplemental Memorandum 10.

4. The court would reach this result even if there had been some slight and accidental leakage from the bankruptcy proceeding to this one. The drastic remedy of voiding an indictment and conviction ought to be available, if at all, when the prophylaxis serves a substantial end, punishing some substantial invasion. Here, never claiming immunity, never seeking to have their testimony shielded from the widest dissemination in the press and elsewhere, defendants were in no sense whipsawed or imposed upon. On the other side, as the grand jury and trial minutes show, there was no purpose to evade or to slight defendants' rights. This would be, in short, a fortuitous and slightly magical reason for concluding now that defendants should not have been rried and convicted after all.

5. Affidavit of Michael F. Armstrong, Esq., sworn to July 22, 1976, par. 15.

6. Id., par. 18.

7. In explaining this conclusion, the court has not overlooked, but has deemed it unnecessary to retrace, further points made by government counsel. It is fair to say, however, that such points have weight: e.g., the long and costly preparation defendants obviously did manage; the ample discovery they were given; the obvious friendliness to them of many of the people, including a large proportion of the Government's witnesses, having knowledge of the relevant events; and the probable willingness of many such people to stand ready to testify whether or not they were tendered travel expenses long in advance and on a standby basis.

APPENDIX C

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-fourth day of August, one thousand nine hundred and seventy-seven.

Present: HON. J. EDWARD LUMBARD,

HON. WILLIAM H. TIMBERS
Circuit Judges

HON. OSCAR H. DAVIS
Court of Claims

United States of America, Plaintiff-Appellee, v. John M. King, A. Rowland Boucher, Defendants-Appellants.	76-1435

A petition for a rehearing having been filed herein by counsel for the appellant, A. Rowland Boucher

Upon consideration thereof, it

is

Ordered that said petition be and it hereby is denied.

A. DANIEL FUSARO
Clerk

APPENDIX D

May 21, 1976

Hon. Marvin E. Frankel
United States District Court
Southern District of New York
United States Courthouse
Foley Square - Room 2002
New York, New York 10007

Re: U.S. v. King and Boucher, 75 Cr. 70

Dear Judge Frankel:

Enclosed please find 4 pages which were just hand delivered to me by A. Rowland Boucher and which were obtained by him yesterday from the United States Courthouse, Denver, Colorado. The remaining transcript, I was just informed by Boucher, is 6 to 8 inches thick and remains in the courthouse in Denver.

The enclosed transcript is evidence that at a very early date, October 1971, the SEC, represented by Mr. Waldeck, was made aware of the possibility, if not probability of immunity under the bankruptcy act and until this issue was raised at the 11th hour by the defendant Boucher, the court and his counsel were totally in the dark.

It is our firm belief that the government had an affirmative duty to inform Boucher at least of the enclosed transcript and he should not now suffer the hardship of a lengthy trial because of that derelection.

With respect to Your Honor's

opinion filed this date; we respectfully submit page two of your opinion is incorrect when it states, "no one connected with this prosecution has access to or read the bankruptcy testimony". See Von Stein's affidavit submitted by the Government; Mr. Wing's affidavit to which is attached excerpts from the 1971, Dallas Texas, proceeding.

Very truly yours,

Andrew J. Maloney

cc: John R. Wing, Esq.
Michael F. Armstrong, Esq.

Parties on Enclosed Transcript:
Mr. Waldeck, SEC
Mr. Gesas, Attorney KRC
Mr. Neary, Attorney for
Trade Creditors Committee

[89]

MR. WALDECK: If Mr. Boucher understands what I've said, I will be satisfied with that, Your Honor.

MR. GESAS: May I address the Court, please? There's a recent statute --

THE REFEREE: Yes, I know.

MR. GESAS: -- which provides for immunity automatically when testimony is given. Now, let us consider the --

MR. WALDECK: Your Honor, it is my contention that Mr. Boucher is not being called pursuant to Section 7A10, which Section provides a blanket immunity, rather it is my contention he is being called either as additional Trustee or as a chief executive of the company to testify on the question of venue, not to render the statement of affairs, which

the officer of a bankrupt is required to render and to submit to examination with respect to -- in connection with Section 7A10, Section 21A or Section 167.

MR. GESAS: Your Honor, I didn't want to be understood as claiming this immunity. Assuming I was in a position to

[90]

claim it for Mr. Boucher individually, which I am not. I'm only pointing out that inasmuch as we're discussing privilege that we better have everything on the boards. Now, it may be that Mr. Waldeck is correct, I guess he'll have to live with that prospect if he's wrong and I merely took the liberty of saying, and as the Court is well aware of, that there is a problem in this area. What the construction of 7A10 or 167 is I certainly

have no expertise to determine --

THE REFEREE: Mr. Waldeck and Mr. Gesas, may I see you at the bench, please?

(Whereupon a discussion was held at the bench.)

THE REFEREE: All right, Mr. Boucher, would you take the stand and then Mr. Waldeck will make a statement to you.

MR. A. ROWLAND BOUCHER, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified on his oath as follows:

THE REFEREE: All right, Mr. Waldeck.

MR. WALDECK: Mr. Boucher, do you

[91]

understand, Sir, that anything you state here today could be used against you?

THE WITNESS: Yes.

MR. WALDECK: And do you understand, Sir, that you need not answer any question which you believe will tend to incriminate you, Sir?

THE WITNESS: I do.

MR. WALDECK: And do you understand that you need not testify?

THE WITNESS: Yes, I do.

MR. WALDECK: And do you understand that you are entitled to a personal Counsel to represent you personally?

THE WITNESS: Yes, I do.

MR. WALDECK: And given these understandings are you nevertheless willing to testify?

THE WITNESS: Yes, I am.

MR. GESAS: By the statements in answer to Mr. Waldeck, you do not, by those statements, waive any general immunity you may be

entitled to?

THE WITNESS: No, sir.

MR. WALDECK: The question of

[92]

immunity is one of law. I am quite --

MR. GESAS: Sure, but inasmuch as the statements have been rendered, I want to be sure that does initiate the law in regard to that.

THE REFEREE: All right, Mr. Boucher, you responded to the statements of Mr. Waldeck, I believe, in the affirmative?

THE WITNESS: Yes, sir.

THE REFEREE: All right, you may proceed, Mr. Neary.

DIRECT EXAMINATION

BY MR. NEARY:

Q Mr. Boucher, would you state your full name for the record.

A A. Rowland Boucher.

Q And what is your present position

with King Resources Company?

A Chief Executive Officer of the King Resources Company and Additional Trustee.

Q And you are so serving at the present time under appointment of this Court?

A That is correct.

Q All right, have you given a deposition in connection with this matter?

APPENDIX E

Memo No. 744

TO: ALL UNITED STATES ATTORNEYS

SUBJECT: Bankruptcy Immunity Under the Organized Crime Control Act of 1970 (Public Law 91-452, October 15, 1970)

As you know, Title II of the above Act amended clause (10) of Section 7(a) of the Bankruptcy Act (11 U.S.C. 25(a)) to provide that the automatic immunity applicable to the testimony of the bankrupt under the Section 7(a) is extended to "any evidence which is directly or indirectly derived from such testimony." This has the effect of barring the use of any leads derived from the testimony of the bankrupt in a criminal investigation or prosecution.

Under 18 U.S.C. 3057 bankruptcy referees, receivers, and trustees are required to report criminal violations to United States Attorneys. With the enactment of the new immunity provision, if successful prosecution of the bankrupt is to result from such referrals, it will be necessary that the Government be in a position to show that no evidence or leads used in the investigation or prosecution were directly or indirectly derived from his immunized testimony. Since this will require close cooperation between bankruptcy officials, the Federal Bureau of Investigation, and United States Attorneys, we have discussed referral procedures under the immunity statute with representatives of the Bankruptcy Division, Adminis-

trative Office of the United States Courts. While it is recognized by all concerned that no referral procedures can be developed that will preserve the criminal case in all instances, certain safeguards can be undertaken that, if followed, might reasonably be expected to protect against inadvertent use of the bankrupt's testimony in developing a criminal case against him.

The Bankruptcy Division of the United States Courts has agreed to recommend the following procedures to bankruptcy referees in handling criminal referrals in bankruptcy proceedings:

(1) In criminal referrals based upon evidence or leads not directly or indirectly obtained from the testimony of the bankrupt, the existing referral procedures will be followed.

(2) In any case in which the bankrupt testifies and a criminal investigation is underway or is anticipated, the bankruptcy referee will order that no one shall have access to the transcript of the bankrupt's testimony without first identifying himself and signing an appropriate record reflecting that he has requested and been granted access to the transcript. Adoption of this procedure will assist the Government in showing in any subsequent criminal proceeding that the prosecution did not have the benefit of a review of that portion of the bankruptcy record.

(3) In addition, in any case in which the bankrupt testifies and a criminal investigation is underway or is anticipated, the bankruptcy referee will appropriately advise trustees, receivers, creditors, attorneys, and other persons who heard the

bankrupt's testimony that, in the event they are interviewed concerning criminal aspects of the case, no disclosure should be made concerning the content of the immunized testimony of the bankrupt.

(4) In any instance in which the only evidence of criminality is developed in the bankrupt's testimony, the referee will refer the case to the United States Attorney for possible criminal investigation without making reference to any information based directly or indirectly upon the bankrupt's testimony. The United States Attorney will request the Federal Bureau of Investigation to conduct a limited investigation, possibly including a review of available books and records and the bankrupt's schedules, to determine whether there is independent evidence upon which a criminal investigation may be predicated. (The Criminal Division recognizes that the argument may be raised that the immunity bars a referral based solely upon the immunized testimony, but it is believed that in cases of significant import, at least, the Department has a responsibility to investigate.)

(5) When the bankrupt is a corporation, bankruptcy referees will consider the feasibility of clearly designating an individual not suspected of criminal conduct as the person to represent the bankrupt under 11 U.S.C. 25(b), thus possibly avoiding a grant of immunity to a prospective criminal defendant.

In any instances in which a bankruptcy criminal investigation is initiated on the basis of information derived from sources other than the bankruptcy referee or a bankruptcy proceeding, United States

Attorneys should be alert to apprize the bankruptcy referee of the investigation in order that, if necessary, he may institute the above safeguards. United States Attorneys are reminded to advise bankruptcy referees of the disposition of criminal investigations in bankruptcy matters.

Bankruptcy referees and United States Attorneys should be alert to the fact that the immunity under the Act extends only to the bankrupt. Incriminating testimony of witnesses other than the bankrupt may properly be the subject of a routine referral under 18 U.S.C. 3057.

In developing these referral procedures, consideration was given to the question whether the immunity conferred in a Section 7(a) hearing (first meeting of creditors) is applicable to subsequent proceedings conducted pursuant to Section 21(a) of the Bankruptcy Act (11 U.S.C. 44(a)). There is case law supporting the argument that the Congress did not intend that the immunity be applicable to a 21(a) hearing. However, the Second Circuit has questioned this distinction on the basis that a 21(a) hearing is merely a continuation of the 7(a) hearing and, therefore, the immunity attaches. While the discussions on this point are dicta, the reasoning of the Second Circuit is persuasive and might well be adopted by the Supreme Court if the issue were brought before it. See United States v. Weisman, 219 F.2d 837 (1955); United States v. Castellana, 344 F.2d 264 (1965).

United States Attorneys are requested to keep the Fraud Section advised of significant problems and developments in the application of these immunity pro-

visions.

Copies of this memorandum are being furnished to the Bankruptcy Division of the United States Courts and the Federal Bureau of Investigation for their information.

/s/ Will Wilson

WILL WILSON
Assistant Attorney General
Criminal Division

APPENDIX F

§ 25. Duties of bankrupts

(a) The bankrupt shall (1) attend at the first meeting of his creditors, at the hearing upon objections, if any, to his application for a discharge and at such other times as the court shall order; (2) comply with all lawful orders of the court; (3) examine and report to his trustee concerning the correctness of all proofs of claim filed against his estate; (4) execute and deliver such papers as shall be ordered by the court; (5) execute and deliver to his trustee transfers of all his property in foreign countries; (6) immediately inform his trustee of any attempt by his creditors or other persons to evade the provisions of this title coming to his knowledge; (7) in case of any person having to his knowledge proved a false claim against his estate, disclose that fact immediately to his trustee; (8) prepare, make oath to, and file in court within five days after adjudication, if an involuntary bankrupt, and with his petition, if a voluntary bankrupt, a schedule of his property, showing the amount and kind of property, the location thereof and its money value, in detail; and a list of all his creditors, including all persons asserting contingent, unliquidated, or disputed claims, showing their residences or places of business, if known, or if unknown that fact to be stated. the amount due to or claimed by each of them, the consideration thereof, the security held by them, if any, and what claims, if any, are contingent, unliquidated or disputed; and a claim for such exemptions as he may be entitled to; all in triplicate, one copy for the clerk, one for the referee, and one for the trustee: *Provided, however*, That the court may for cause shown grant further time for the filing of such schedules if, with his petition in a voluntary proceeding or with his application to have such time extended in an involuntary proceeding, the bankrupt files a list of all such creditors and their addresses; (9) file in triplicate with the court at least five days prior to the first meeting of his creditors a statement of his affairs in such form as may be prescribed by the Supreme Court; (10) at the first meeting of his creditors, at the hearing upon objections, if any, to his discharge and at such other times as the court shall order, submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate or the granting of his discharge; but no testimony given by him shall be offered in evidence against him in any criminal proceeding, except such testimony as may be given by him in the hearing upon objections to his discharge: *Provided, however*, That when the bankrupt is required to attend for examination, except at the first meeting

and at the hearing upon objections, if any, to his discharge, he shall be paid actual and necessary traveling expenses for any distance in excess of one hundred miles from his place of residence at the date of bankruptcy: *And provided further*, That the court may for cause shown, and upon such terms and conditions as the court may impose, permit the bankrupt to be examined at such place as the court may direct whether within or without the district in which the proceedings are pending; and (11) when required by the court, prepare, verify, and file with the court in duplicate a detailed inventory, showing the cost to him of his merchandise or of such other property as may be designated, as of the date of his bankruptcy.

(b) Where the bankrupt is a corporation, its officers, the members of its board of directors or trustees or of other similar controlling bodies, its stockholders or members, or such of them as may be designated by the court, shall perform the duties imposed upon the bankrupt by this title. July 1, 1898, c. 541, § 7, 30 Stat. 548; May 27, 1926, c. 406, § 4, 44 Stat. 663; June 22, 1938, c. 575, § 1, 52 Stat. 847; July 7, 1952, c. 579, § 4, 66 Stat. 422.

APPENDIX G

§ 502. Application of other provisions

The provisions of chapters 1 to 7, inclusive, of this title shall, insofar as they are not inconsistent or in conflict with the provisions of this chapter, apply in proceedings under this chapter: *Provided, however*, That section 46, subdivisions (h) and (n) of section 93, section 104, and subdivision (f) of section 110 of this title, shall not apply in such proceedings unless an order shall be entered directing that bankruptcy be proceeded with pursuant to the provisions of chapters 1 to 7, inclusive. For the purposes of such application, provisions relating to "bankrupts" shall be deemed to relate also to "debtors", and "bankruptcy proceedings" or "proceedings in bankruptcy" shall be deemed to include proceedings under this chapter. For the purposes of such application the date of the filing of the petition in bankruptcy shall be taken to be the date of the filing of an original petition under section 528 of this title, and the date of adjudication shall be taken to be the date of approval of a petition filed under section 527 or 528 of this title except where an adjudication had previously been entered.

July 1, 1898, c. 541, § 102, as added June 22, 1938, c. 575, § 1, 52 Stat. 833.

APPENDIX H

§ 567. Powers and duties; trustee

The trustee upon his appointment and qualification—

(1) shall, if the judge shall so direct, forthwith investigate the acts, conduct, property, liabilities, and financial condition of the debtor, the operation of its business and the desirability of the continuance thereof, and any other matter relevant to the proceeding or to the formulation of a plan, and report thereon to the judge;

(2) may, if the judge shall so direct, examine the directors and officers of the debtor and any other witnesses concerning the foregoing matters or any of them;

(3) shall report to the judge any facts ascertained by him pertaining to fraud, misconduct, mismanagement and irregularities, and to any causes of action available to the estate;

(4) may, subject to the approval of the judge, employ such person or persons as the judge may deem necessary for the purpose of assisting the trustee in performing the duties imposed upon him under this chapter;

(5) shall, at the earliest date practicable, prepare and submit a brief statement of his investigation of the property, liabilities, and financial condition of the debtor, the operation of its business and the desirability of the continuance thereof, in such form and manner as the judge may direct, to the creditors, stockholders, indenture trustees, the Securities and Exchange Commission, and such other persons as the judge may designate; and

(6) shall give notice to the creditors and stockholders that they may submit to him suggestions for the formulation of a plan, or proposals in the form of plans, within a time therein named.

July 1, 1898, c. 541, § 167, as added June 22, 1938, c. 575, § 1, 52 Stat. 890.

APPENDIX I

§ 1406. Immunity of witnesses

Whenever in the judgment of a United States attorney the testimony of any witness, or the production of books, papers, or other evidence by any witness, in any case or proceeding before any grand jury or court of the United States involving any violation of—

(1) any provision of part I or part II of subchapter A of chapter 39 of the Internal Revenue Code of 1954 the penalty for which is provided in subsection (a) or (b) of section 7237 of such Code,

(2) subsection (c), (h), or (i) of section 2 of the Narcotic Drugs Import and Export Act, as amended (21 U.S.C., sec. 174), or

(3) the Act of July 11, 1941, as amended (21 U.S.C., sec. 184a),

is necessary to the public interest, he, upon the approval of the Attorney General, shall make application to the court that the witness shall be instructed to testify or produce evidence subject to the provisions of this section, and upon order of the court such witness shall not be excused from testifying or from producing books, papers, or other evidence on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture. But no such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding (except prosecution described in the next sentence) against him in any court. No witness shall be exempt under this section from prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion as provided in this section. Added July 18, 1956, c. 629, Title II, § 201, 70 Stat. 574.

APPENDIX J

§ 2514. Immunity of witnesses

Whenever in the judgment of a United States attorney the testimony of any witness, or the production of books, papers, or other evidence by any witness, in any case or proceeding before any grand jury or court of the United States involving any violation of this chapter or any of the offenses enumerated in section 2516, or any conspiracy to violate this chapter or any of the offenses enumerated in section 2516 is necessary to the public interest, such United States attorney, upon the approval of the Attorney General, shall make application to the court that the witness shall be instructed to testify or produce evidence subject to the provisions of this section, and upon order of the court such witness shall not be excused from testifying or from producing books, papers, or other evidence on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture. No such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding (except in a proceeding described in the next sentence) against him in any court. No witness shall be exempt under this section from prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion as provided in this section.

Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 216.

APPENDIX K

§ 3486. Compelled testimony tending to incriminate witnesses; immunity

(a) In the course of any investigation relating to any interference with or endangering of, or any plans or attempts to interfere with or endanger the national security or defense of the United States by treason, sabotage, espionage, sedition, seditious conspiracy or the overthrow of its Government by force or violence, no witness shall be excused from testifying or from producing books, papers, or other evidence before either House, or before any committee of either House, or before any joint committee of the two Houses of Congress on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture, when the record shows that—

(1) in the case of proceedings before one of the Houses of Congress, that a majority of the members present of that House; or

(2) in the case of proceedings before a committee, that two-thirds of the members of the full committee shall by affirmative vote have authorized such witness to be granted immunity under this section with respect to the transactions, matters, or things concerning which he is compelled, after having claimed his privilege against self-incrimination to testify or produce evidence by direction of the presiding officer and

that an order of the United States district court for the district wherein the inquiry is being carried on has been entered into the record requiring said person to testify or produce evidence. Such an order may be issued by a United States district court judge upon application by a duly authorized representative of the Congress or of the committee concerned. But no such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is so compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding (except prosecutions described in subsection (d) hereof) against him in any court.

(b) Neither House nor any committee thereof nor any joint committee of the two Houses of Congress shall grant immunity to any witness without first having notified the Attorney General of the United States of such action and thereafter having secured the approval of the United States district court for the district wherein such inquiry is being held. The Attorney General of the United States shall be notified of the time of each proposed application to

the United States district court and shall be given the opportunity to be heard with respect thereto prior to the entrance into the record of the order of the district court.

(c) Whenever in the judgment of a United States attorney the testimony of any witness, or the production of books, papers, or other evidence by any witness, in any case or proceeding before any grand jury or court of the United States involving any violation of section 1751 of title 18 of the United States Code, or involving any interference with or endangering of, or any plans or attempts to interfere with or endanger, the national security or defense of the United States by treason, sabotage, espionage, sedition, seditious conspiracy, violations of chapter 115 of title 18 of the United States Code, violations of the Internal Security Act of 1950 (64 Stat. 987), violations of the Atomic Energy Act of 1946 (60 Stat. 755), as amended, violations of sections 212(a) (27), (28), (29) or 241(a) (6), (7) or 313(a) of the Immigration and Nationality Act (66 Stat. 182–186; 204–206; 240–241), and conspiracies involving any of the foregoing, is necessary to the public interest, he, upon the approval of the Attorney General, shall make application to the court that the witness shall be instructed to testify or produce evidence subject to the provisions of this section, and upon order of the court such witness shall not be excused from testifying or from producing books, papers, or other evidence on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture. But no such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding (except prosecution described in subsection (d) hereof) against him in any court.

(d) No witness shall be exempt under the provision of this section from prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion as provided in this section.